Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-1888

ORION RESEARCH INCORPORATED,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner Orion Research Incorporated ("ORION") would like to inform the Court that the judgment for which review is sought has been reported (at 615 F. 2d 551) and, secondly, respond to three assertions made by respondent in its Memorandum in Opposition.

1. The Memorandum for the Respondent in Opposition (Mem. Opp.) states, at 4, "Petitioner's suggestion (Pet. 21) that decisions upholding Exemption 4 claims may never be based on in camera inspection is frivolous." This misstates ORION'S position. Orion maintains that final decisions made solely on the basis of sua sponte, in camera inspections, by the court alone, are not appropriate in FOIA cases turning on exemption 4. The difference is obvious.

2. Far from presenting a "narrow ruling" affecting only "the facts of this case" (Mem. Opp. 3), the case at bar presents typical issues that are likely to recur. To conserve judicial resources, a District Court judge is very likely to try to resolve an Exemption 4 case summarily upon in camera examination rather than undergo a lengthy trial to determine the extent of "competitive harm" and "chilling effect." Indeed, the District Court in the case at bar did that very thing, stating:

> . . .I concluded from the record that a trial on the merits of this matter would be a misuse of judicial economy. This conviction. . .prompted an Order calling for an in camera inspection of the materials. (Pet. App. 28)

This sequence of events is likely to recur in FOIA litigation, and not

only Exemption 4 cases. See, e.g., Military Audit Project v. Bush, 418 F. Supp. 876 (D.D.C. 1976) (Exemptions 1 and 3), in which the government "answered" a FOIA complaint by submitting the requested documents for in camera inspection and moving to dismiss. (The court refused the "offer" and denied the motion.) Thus the case at bar raises issues common to all FOIA litigation and deserves plenary review by the Supreme Court.

3. Respondent attempts (Mem. Opp. 5, n. 4) to distinguish National Association of Government Employees v. Campbell, 593 F. 2d 1023 (D.C.Cir. 1978) (N.A.G.E.) which ORION submits is squarely in point and contrary to the Court of Appeals decision below (Pet.

22). The purported ground of distinction is that N.A.G.E. involved information in the field of insurance while the case at bar involves "new technology".[1] Without delving into the relative commercial importance of innovation in insurance and chemistry,[2] it suffices to note that the N.A.G.E. opinion does not mention the characteristics of the insurance industry and that the judgment was in no way based on those characteristics.

The Court of Appeals for the D. C. Circuit's opinion in N.A.G.E. rigorously protects a FOIA plaintiff's right to an open trial. The Court of Appeals for

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[1]The respondent begs the question; one of the factual issues upon which ORION seeks a hearing is whether the Meloy Technical Proposal contains any "new technology" at all.

the First Circuit's opinion, however, affirms a summary judgment admittedly based on notions of "judicial economy." (Pet. App. 28). The conflict is undeniable and deserves resolution by this Court.

Respectfully submitted,

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[2]ORION notes, however, that the respondent's opinion that "The significance of innovation in the field of insurance is much more problematic..." (Mem. Opp. 5, n. 4) would be disputed by the insurance carrier intervenors who submitted contrary affidavits to the N.A.G.E District Court. (N.A.G.E., supra, at 1025).